SUPREME COURT, U. S.

FILED

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Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-457

ARTHUR VENIOS
AND
GARY WALL,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Petitioners Arthur Venios and Gary Wall pray that a writ for certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on August 22, 1975.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit was delivered and filed on August 22, 1975, and is reprinted in Appendix A hereto (Pp. 23-32), *infra*. It has not yet been reported. On December 18, 1974, the

District Court held a hearing on the Defendants' Motions to Suppress Evidence obtained as a result of wiretaps purportedly authorized pursuant to 18 U.S.C. § 2516(1) and allowed the Motions without a written opinion. On December 19, 1974, the District Court endorsed the transcript of that hearing as constituting its Memorandum of Findings and Rulings. The transcript was filed in the clerk's office on December 20, 1974, but the court's order and Memorandum have not been reported. On January 20, 1975, the Government filed a Motion for Reconsideration which was denied by the District Court and filed in the clerk's office on the same date.

Jurisdiction.

The judgment of the Court of Appeals was delivered and entered on August 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the Court of Appeals lacked jurisdiction to review the order of the District Court denying the Government's Motion for Reconsideration because such an order is not an appealable order under 18 U.S.C. § 2518(10)-(b) and because a timely appeal from an order granting a motion to suppress under 18 U.S.C. § 2518(10)(a) does not enlarge the jurisdiction of the Court of Appeals to review orders from which no right of appeal exists.

2. Whether the Court of Appeals lacked jurisdiction over the appeal because the Government did not take its appeal within thirty days after the entry of the order granting the motions to suppress and because this Court's decision in *United States* v. *Healy*, 376 U.S. 75 (1964), is not applicable to extend the appeal period.

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3. Whether the Court of Appeals erred in vacating the order of the District Court granting the motions to suppress because the District Court did not abuse its discretion in controlling the conduct of the suppression hearings.

Statutes Involved.

18 U.S.C. § 2518(10) (Pub.L. No. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218).

> (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

18 U.S.C. § 3731 (June 25, c. 645, 62 Stat. 844; Pub.L No. 90-351, Title VIII, § 1301, 82 Stat. 237).

• • •

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

• • •

From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

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Statement of the Case.

The Petitioners seek the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on August 22, 1975. The Court of Appeals vacated the District Court's order granting the Defendants' Motions to Suppress under 18 U.S.C. § 2518(10)(a) and remanded the case to the District Court for further proceedings. (App. A, p. 32).[1] The District Court's order suppressing the wiretap evidence was based on a factual finding by the court that the Government had failed to satisfy its burden of clearly establishing that the authorization for the wiretap applications had been given in compliance with 18 U.S.C. § 2516(1). The District Court had jurisdiction over the substantive offenses described in 18 U.S.C. §§ 1084, 1952 and 371 under 18 U.S.C. § 3231.

On November 4, 1970, indictments were returned against Petitioners and others for alleged violations of 18 U.S.C. §§ 1084, 1952 and 371. The Petitioners filed timely Motions to Dismiss the Indictments and Motions to Suppress, urging that the wiretap applications had not been authorized in compliance with 18 U.S.C. § 2516(1).

The first affidavits filed by the Government in the District Court (A. 134-136) were filed in opposition to the Petitioners' Motions to Dismiss the Indictments and Motions to Suppress. Those affidavits were considered by the District Court in a hearing on February 14, 1972, with respect to the Defendants' Motions to Suppress and were found by the Court, and conceded by the Special Attorney for the Government, not to establish that the wiretap applications had been authorized by Attorney General

[1] References to (A.) are to the Appendix filed by the Government in the Courts of Appeals.

References to (App. A) are to Appendix A *infra*, Pp. 23-32.

John N. Mitchell or a specially designated Assistant Attorney General (A. 88, 95-97). At that hearing, there was an extended colloquy between the court and the Special Attorney for the Government concerning the evidence which the court would find sufficient to meet the Government's burden of proving that it had complied with 18 U.S.C. § 2516 (A. 88-89, 107-120). At the request of the Government the court allowed four weeks for the submission of the requested affidavits (A. 118-120). On March 13, 1972, the Government filed three additional affidavits: one by the Attorney General's Executive Assistant Sol Lindenbaum implying that—on the basis of handwriting familiarity—he had concluded that Attorney General Mitchell had initialled certain memoranda purporting to be the authorizations for the applications in these cases (A. 121-128); one by Assistant Attorney General Henry E. Peterson stating that approval had been in the Office of the Attorney General (A. 129-131); and one by Attorney General Mitchell stating the various procedures used by the Justice Department in approving wiretap applications (A. 132-133).

On December 18, 1974, the District Court held a hearing on the Petitioners' Motions to Suppress and, after being informed by the Special Attorney that the Government had no further evidence to offer on the issue of authorization, allowed the Motions to Suppress (A. 145-149). It found, as a matter of fact, that the affidavits submitted by the Government were insufficient proof of proper authorization for the wiretap application (A. 145-149).

On January 20, 1975, the Government filed a Motion for Reconsideration of the Suppression Order which had attached to it a second affidavit by John N. Mitchell dated January 15, 1975, stating that Mr. Mitchell had person-

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ally approved the requests for authorization to apply for wiretaps in these cases and had initialled the memoranda in question. The Motion for Reconsideration was denied by the District Court on January 20, 1975, and its denial entered in the District Court on the same date (A. 151-153).

On February 19, 1975, the Government filed a Notice of Appeal from the order of suppression and from the denial of the Motion for Reconsideration citing 18 U.S.C. § 3731 as the statute giving the Court of Appeals jurisdiction over the appeal. On August 22, 1975, the Court of Appeals for the First Circuit vacated the District Court's order granting the Motions to Suppress and remanded for further proceedings consistent with its opinion.

Reasons for Granting the Writ.

The reasons for this Court's granting the writ of certiorari will be separately advanced under each of the issues addressed below.

I. The Court of Appeals Lacked Jurisdiction to Review the Order of the District Court Denying the Government's Motion for Reconsideration Because such an Order is Not an Appealable Order under 18 U.S.C. § 2518(10)(b) and Because a Timely Appeal from an Order Granting a Motion to Suppress under 18 U.S.C. § 2518(10)(a) does Not Enlarge the Jurisdiction of the Court of Appeals to Review Orders from Which No Right of Appeal Exists.

It has long been stated in decisions of this Court that the Government's right to appeal in criminal cases must

be expressly authorized by statute, is not favored and is to be strictly construed. *United States* v. *Wilson*, 420 U.S. 332 (1975). See *Will* v. *United States*, 389 U.S. 90, 97 n.5 (1967). *Carroll* v. *United States*, 354 U.S. 394, 400 (1957). *United States* v. *Sanges*, 144 U.S. 310 (1892). The Government asserted in its Notice of Appeal that its right to appeal in this case was granted by 18 U.S.C. § 3731 from both the order granting the Motions to Suppress and the denial of the Motion for Reconsideration. The Court of Appeals properly recognized, however, that the District Court's order of suppression was made under 18 U.S.C. § 2518(10)(a). (See App. A, p. 23). Thus, properly and fairly construed, the Government's right to appeal, if any, was granted by 18 U.S.C. § 2518(10)(b). (See "Statutes Involved," *supra*).

Applying the principles of the above-cited decisions of this Court to the statutory right of appeal in question, one must conclude that the Government does not have a right to appeal from a district court's order denying a Government motion for reconsideration since that is not one of the orders expressly enumerated in the statute as appealable. The Petitioners concede, however, that this Court has never spoken on the precise status of a motion for reconsideration as an appealable order under 18 U.S.C. § 2518(10)(b) or any other statute giving the Government a right of appeal in criminal cases.

The Petitioners' conclusion is supported by the decision in *United States* v. *Greely*, 413 F. 2d 1103 (D.C. Cir. 1969), which held that the United States does not have a right to appeal from a district court's denial of a Government motion to reopen a suppression hearing. Although the decision in that case directly applied only to appealable orders under 18 U.S.C. § 3731, the language of that stat-

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ute was very similar to the language of 18 U.S.C. § 2518-(10)(b). (See "Statutes Involved," *supra*).[2]

Since the exercise of jurisdiction by the Court of Appeals is in conflict with applicable decisions of this Court and with the decision of the Court of Appeals for the District of Columbia Circuit in *United States* v. *Greely*, *supra*, and without foundation in 18 U.S.C. § 2518(10)(b), this Court should issue a writ of certiorari to resolve the conflict.

In *United States* v. *Healy*, 376 U.S. 75, 77-80 (1964), this Court held that if the Government filed a petition for rehearing of an appealable order under 18 U.S.C. § 3731 within 30 days after the entry of the appealable order, the 30 day appeal period was restarted when the Court denied the petition for rehearing. Assuming *arguendo* that the rule of *Healy* is applicable to the Government's appeal in this case such that the appeal from the order granting the Motions to Suppress was timely, the question presented is whether the jurisdiction of the Court of Appeals was thereby enlarged to permit review of an order from which the Government had no independent right of appeal or review.

The decisions of this Court cited above for the proposition that the Government's right of appeal in criminal cases must be expressly enumerated by statute tend strongly to support a negative answer to the question. It would be incongruous to hold that although the Government does not have a statutory right to obtain review of

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[2] *Greely* construed § 3731 prior to the 1971 amendment. If the Government's right to appeal in this case is granted by that statute, then *Greely* is directly applicable here and establishes a conflict between the circuits because the indictments in this case were returned prior to the effective date of the 1971 amendment to 18 U.S.C. § 3731. (See Pub. L. No. 91-644, Title III, § 14(b), 84 Stat. 1890).

an order, it may obtain such review if it has the right to appeal from some other order in the case.

Moreover, the foundation of the Government's appeal in this case—18 U.S.C. § 2518(10)(b)—expressly permits appeals only from orders granting motions to suppress evidence obtained as a result of wiretaps. It does not permit appeals from collateral orders which may have the effect of reinforcing orders granting motions to suppress. Thus, the District Court's denial of the Motion for Reconsideration cannot be considered as incidental to the order granting the Motions to Suppress.

The question of enlargement of the jurisdiction of the courts of appeals beyond the review of orders from which a statutory right of appeal exists is a substantial federal question which should be decided by this Court.

It is clear from the decision of the Court of Appeals in the case at bar that it reviewed the District Court's discretionary denial of the Government's Motion for Reconsideration and vacated the District Court's suppression order on the ground that the District Court abused its discretion in denying the Motion for Reconsideration. The court stated:

> "[H]ad the Government offered nothing further after the December 18 ruling we might well have accepted the ruling as within the court's discretion" (App. A, p. 28).

Here the Court of Appeals admits that it would not have found an abuse of discretion by the District Court had the Government not attempted to submit the second Mitchell affidavit. Thus, the court must have relied upon that attempted submission as the basis for its decision that the District Court abused its discretion. The court then stated:

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> "The court might have construed the lack of a Mitchell affidavit at a time when such affidavits had been furnished in other cases as indicative that Mitchell could not personally vouch for these particular transactions. When his affidavit was tendered, however, this largely allayed doubts on that score, and we think the court should have reopened the proceeding.
>
> Normally, of course, district courts have wide latitude to refuse reconsideration. But this was a unique situation . . . ." (App. A, pp. 28-29).

Thus, the Court of Appeals reviewed the District Court's discretionary denial of the Government's Motion for Reconsideration. For the reasons set forth above, this was not an order within the jurisdiction of the Court of Appeals to review.

Since the exercise of jurisdiction by the Court of Appeals is in clear conflict with the limited scope of Government appeals sanctioned by this Court and is without foundation in 18 U.S.C. § 2518(10)(b), this Court should issue a writ of certiorari to review the judgment.

II. The Court of Appeals Lacked Jurisdiction over the Appeal Because the Government did Not Take Its Appeal within Thirty Days After the Entry of the Order Granting the Motions to Suppress and Because this Court's Decision in *United States* v. *Healy*, 376 U.S. 75 (1964), is Not Applicable to Extend the Appeal Period.

Assuming, as was found by the Court of Appeals, that the District Court's Order granting the Motions to Suppress was entered either on December 19, 1974 or December 20, 1974, and that the Government's Motion for Reconsideration was filed within 30 days after the entry of

that order, the Petitioners assert that the Court of Appeals lacked jurisdiction to consider the appeal because the appeal was not taken within the time period mandated by 18 U.S.C. § 2518(10)(b). (See "Statutes Involved," *supra*).

The Government successfully argued in the Court of Appeals that this Court's decision in *United States* v. *Healy*, 376 U.S. 75 (1964) gave the Court of Appeals jurisdiction to consider the appeal from the Suppression Order because the filing of its Motion for Reconsideration extended the appeals period for an additional 30 days. (See App. A, p. 32). Without attributing any significance to the denomination of the intervening motion, the Petitioners contend that *United States v. Healy* is inapplicable to the facts of this case.

A. *The rule of* United States v. Healy *does not apply to extend the period for appeal to the Court of Appeals where the intervening motion is based not on a reconsideration of applicable law but on an attempt to submit additional facts.*

United States v. *Healy, supra*, involved the filing by the Government of a petition for rehearing in the district court seeking a reconsideration by the district court of the law applicable to the case. There, the Government asserted that errors of law had been made by the district court. In concluding that such a petition restarted the appeal period, this Court stated:

> "[T]o deprive the Government of the opportunity to petition a lower court for the correction of errors might, in some circumstances, actually prolong the process of litigation—since plenary consideration of *a*

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> *question of law* here ordinarily consumes more time than disposition of a petition for rehearing—and could, in some cases, impose an added and unnecessary burden of adjudication upon this Court [footnote omitted]." 376 U.S. at 80 (emphasis added).

Aside from the apparent considerations of this Court's control over its docket where the Government had a right of direct appeal, it is clear that the purposes underlying the Court's decision were to advance the speedy resolution of litigation and to avoid unnecessary appellate decisions. A petition for rehearing *based on the consideration of the correctness of the legal ruling of the lower court* advances both such purposes.

An intervening motion which attempts to submit additional facts to the court does not involve such considerations. First, it does not avoid appellate decisions because the question of the correctness of the district court's application of law remains open. Moreover, since review by a court of appeals of factual findings by the district court is extremely limited, it is unlikely that an appeal would be taken from orders based on factual findings. Second, it does not advance the speedy resolution of the litigation. Where the district court's order rests on findings of fact, an appeal would normally not be taken whether or not the factual basis of the court's order is reconsidered. Where the district court's order rests on its view of the law, appellate review of the rulings of law is delayed by the intervening motion until the district court has ruled on it. Thus, none of the underlying purposes of *Healy* is advanced by permitting an extension of the appeal period by the Government's filing of a motion which attempts to submit additional facts to the district court.

In the case at bar, the Government's Motion for Reconsideration did not even suggest that the district court had misapplied legal principles. (See A. 151-153). Rather, it was predicated solely on the additional facts set forth in the second Mitchell affidavit and, as such, constituted an attempt by the Government to persuade the district court to change its findings of fact—a matter not open to consideration by the Court of Appeals.

Since the purposes underlying this Court's decision in *United States* v. *Healy* would not be served by an extension of the appeal period by the Government's filing a Motion for Reconsideration based on findings of fact as opposed to rulings of law, even if the rule of *Healy* is otherwise applicable to appeals under 18 U.S.C. § 2518-(10)(b), it should not be so extended.

A further consideration warrants the refusal of this Court to extend the rule of *Healy* to motions raising factual questions. At some point in the litigation of every case, the court and the parties are entitled to put to rest the factual aspects of the case. In this matter, that point was December 18, 1974. The United States, no less than a defendant, should have its day in court—but not an interminable opportunity to relitigate factual questions day after day. No benefit accrues to a district court, to a court of appeals or to defendants from permitting an extension of the appeal period where the intervening motions raise factual questions comparable to that which may exist from an extension where the motion raises legal questions.

Since this issue involves the important question of the extent of jurisdiction of the courts of appeals over appeals by the United States and that question has not been, but should be, settled by this Court, a writ of certiorari should issue.

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B. *The rule of* United States v. Healy *does not authorize an extension of the appeal period where the Government is guilty of bad faith in petitioning for rehearing.*

The second distinction between the facts of this case and the case of *United States* v. *Healy, supra,* rests in the bona fides of the Government in presenting its evidence in support of its position that the wiretap applications were properly authorized. In *United States* v. *Healy, supra,* this Court recognized the appropriateness of an inquiry into the bona fides of the Government in petitioning for rehearing and its effect on the Court's decision whether the appeal was filed in a timely manner. There the Court said:

> "In this case, the record and legal issues plainly indicate the good faith of the Government in petitioning for rehearing. We would, of course, not countenance the United States' using such petitions simply as a delaying tactic in criminal litigation; there is, however, not the slightest basis for believing that it would try to do so." 376 U.S. at 80, n.4.

The Petitioners submit that an examination of the facts of this case establishes the lack of good faith on the part of the Government. The Court of Appeals apparently relied exclusively on the necessity for certification by the United States Attorney that the appeal is not taken for purposes of delay as foreclosing the need for such an inquiry. (See App. A, p. 32). The Petitioners assert that such reliance is misplaced. The certification relates only to the claim of appeal and not to prior motions or occurrences in the district court. Moreover, it is obvious from *Healy* that this Court's inquiry into the good faith of the Government is not limited to the mere mechanics of the

filing of the intervening motion. If the Government always has an opportunity to file a motion for reconsideration of a suppression order based on additional facts and the Court of Appeals has jurisdiction to review the discretionary denial of such a motion, there is little incentive for the Government to present all of its evidence supporting the wiretap applications at one time. Accordingly, the scope of the inquiry must be as broad as is necessary to determine the reason for the Government's delay in presenting the additional facts.

The Petitioners assert that, while an extensive recitation of prior proceedings in this case is not appropriate here, a few occurrences during the course of its protracted history warrant comment and clearly establish the lack of good faith by the Government leading to its filing of the Motion for Reconsideration.

The first affidavits produced by the Government in this case in opposition to the Motion to Suppress were filed on November 29, 1971 (A. 4). Those affidavits—by Lindenbaum and Peterson—were considered by the District Court on February 14, 1972, and found to be lacking in that they failed to establish that the authorization for the wiretap had been given personally by Attorney General Mitchell as required by statute (A. 81-84). In the course of considering the problem of hearsay in the Lindenbaum affidavit, the court expressly addressed the necessity for obtaining an affidavit from the Attorney General (A. 82-84). Even the Special Attorney for the Government agreed, in 1972, with the court and the Defendants that the affidavit was inadequate (A. 88). The Defendants at that same hearing made clear to the court and the Government that *something more than affidavits* would be necessary to establish that John Mitchell had personally authorized the wiretap applications and that affidavits

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would be acceptable only as offers of proof, and the court and the Government recognized and accepted their position (A. 109-111, 115-116). In fact, the Government agreed to accept the risk that the affidavits which were to be produced might not satisfy the Government's burden (A. 116).

Finally, both the proposed affiant and the nature of the affidavit necessary were clearly described by the court:

> "[THE COURT]: Also, do not forget my suggestion and direct suggestion, that perhaps the best source of information as to who signed these initials over the typewritten name of John N. Mitchell would be Mr. Mitchell himself.
>
> "[SPECIAL ATTORNEY FOR THE GOVERNMENT]: I thoroughly agree and appreciate your Honor's position [A. 88-89].
>
> • • •
>
> "[THE COURT]: You have your work cut out for you.
>
> "[SPECIAL ATTORNEY FOR THE GOVERNMENT]: I realize that.
>
> "[THE COURT]: How much time do you need? You need more than two weeks, I take it, for the affidavits. Make sure that you make them explicit and not on hearsay. Go right straight to the source of the information itself. Go to those people whose testimony would be received in evidence in a court of law in person and have them state things that would not be objected to on the ground that they would be inadmissible under some rule of law excluding them.

"[SPECIAL ATTORNEY FOR THE GOVERNMENT]: Bearing that in mind, your Honor, may the government have four weeks . . ." [A. 118-119].

In response to the court's order, the Government filed three affidavits—one each from Lindenbaum, Peterson and Mitchell.

The Lindenbaum affidavit is similar to the one found by the District Court on February 14, 1972, to be lacking in that it does not evidence personal knowledge. It rests on the affiant's alleged familiarity with Mitchell's handwriting found to be insufficient by the court on December 18, 1974 (A. 121-122). The Peterson affidavit is equally inadequate. It states only that approval was "in the Office of the Attorney General" (A. 129-131). The Mitchell affidavit is inconclusive and internally inconsistent. While Mitchell stated that he required that "all requests for authority to file such applications be forwarded to me for consideration" he also stated that prior to November 20, 1971, his Executive Assistant authorized many such applications (A. 132-133). The authorizations in these cases were given on July 16, 1970 and earlier. Mitchell's affidavit does not even mention the authorizations in these cases.

Thus, notwithstanding express direction from the District Court almost three years before the December 18, 1974 hearing, the Government still had failed and refused to file adequate affidavits. When, at the December 18, 1974 hearing on the Motions to Suppress, the court asked the Government's attorney what further would be produced, he replied "Nothing, your Honor" (A. 146). He explained this cryptic response by advising the court that in February, 1972, prior to decisions in other cases which might have led the Government to rely on the affidavits

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which it had produced, he had requested the necessary affidavits from the Department of Justice but had been advised that what he had received was all he would get (A. 147-148). The District Court properly concluded that the Department of Justice had presented its case on the issue of authorization and that fault for the demise of the case resided in the office of the Attorney General (A. 148-149). Then, when the District Court made its factual findings, the Government—after three years of delay—finally presented the second Mitchell affidavit in a last-ditch effort to prevail.

If additional evidence of the Government's lack of good faith is necessary, then the Petitioners point to the delay in the resolution of the Motions to Suppress occasioned by the Government's posture, adopted at a hearing in April, 1973, that the case of *United States* v. *Giordano*, 416 U.S. 505 (1974), would resolve the questions presented. As a result, the motions were not heard at that time. In fact, *United States* v. *Giordano*, *supra*, would be decisive in favor of the Petitioners had not the Government subsequently changed its legal theory in an attempt to bring the facts of this case within the legal distinctions of *United States* v. *Chavez*, 416 U.S. 562 (1974), which it urged in the Court of Appeals was controlling.

The Petitioners respectfully submit that this Court should find that the lack of diligence, changing positions and a recently produced affidavit of the Government so far evidence its lack of good faith in these proceedings as to warrant the issuance of a writ of certiorari to review the exercise of jurisdiction of the Court of Appeals on authority of *United States* v. *Healy*, 376 U.S. 75 (1964).

III. The Court of Appeals Erred in Vacating the Order of the District Court Granting the Motions to Suppress Because the District Court did Not Abuse Its Discretion in Controlling the Conduct of the Suppression Hearings.

If this Court should find that the decision of the Court of Appeals was not based on its decision that the District Court had abused its discretion in denying the Government's Motion for Reconsideration, then it must find that the Court of Appeals held that the District Court abused its discretion in controlling the right of the Government to introduce evidence to meet its burden on the issue of the wiretap authorizations. In its opinion, the Court of Appeals stated that this case presented a unique situation where those immediatly responsible for the Government's case could not be said to have been derelict in their preparation (App. A, p. 29). If that statement constituted the basis for a finding that the District Court abused its discretion in refusing to further consider the additional affidavit submitted by the Government, then the judgment of the Court of Appeals was clearly in error.

As set forth in Argument II.B, *supra*, the Special Attorney for the Government admitted at the December 18, 1974 suppression hearing that both he and the office of the Attorney General had been aware of the evidence necessary to sustain the Government's burden for almost three years (A. 147-148). Yet, it had failed to produce the necessary evidence. The Government made its decision in February, 1972 and adhered to that decision for three years in the face of strong protest from the Petitioners. Now, seeking to avoid the consequences of that decision at the expense of the Petitioners and to the great disruption of a district court's orderly and proper administra-

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tion of justice and control of its docket, it has enlisted the aid of a court of appeals willing to interfere with the proper discretionary processes of a district court.

The Court of Appeals opinion and decision constitutes a departure so far from the accepted and usual course of judicial proceedings as to warrant this Court's exercise of its supervisory power through the issuance of a writ of certiorari.

Conclusion.

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
For the First Circuit

No. 75-1091

UNITED STATES OF AMERICA,

APPELLANT,

v.

ANTHONY M. ST. LAURENT, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(WALTER J. SKINNER, *District Judge*)

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Reuben H. Wallace, Jr., Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, and *John R. Tarrant*, Special Attorney, Department of Justice, were on brief, for appellant.

Morris M. Goldings, with whom *Mahoney, Atwood & Goldings* was on brief, for Arthur Venios, appellee.

Charlotte Anne Perretta and *Keating, Perretta & Pierce* on brief for Gary Wall, appellee.

Martin G. Weinberg, Jeffrey J. Binder, and *Crane, Inker & Oteri* on brief for Anthony M. St. Laurent and William H. Burbidge, appellees.

Melvin S. Louison joining in the brief for appellee, Arthur Venios for William Duarte, appellee.

Joseph J. Balliro joining in the brief for appellee, Arthur Venios for Joseph Badway, appellee.

August 22, 1975

CAMPBELL, *Circuit Judge*. This is an appeal by the Government from the granting of a motion to suppress evidence obtained from wiretaps, *see* 18 U.S.C. § 2518(10(a).* The background situation is like that in *United States* v. *Chavez*,

* We postpone until later our discussion of appellees' contention, which we reject, that the appeal was untimely.

416 U.S. 562 (1973). The court orders authorizing the wiretaps were based on a form letter purportedly but not actually from Assistant Attorney General Will Wilson, *id.* at 566. After indictments were returned, the Government filed affidavits conceding that Will Wilson had neither signed the letter nor made the judgment to seek wiretap authority. However, Sol Lindenbaum, the Attorney General's Executive Assistant, stated that Attorney General John N. Mitchell, by personally initialled memoranda, had himself authorized the taps in question. A copy of the Attorney General's purported authorizing memorandum was tendered with the Lindenbaum affidavit. The described routines were in all essentials like those recounted in *Chavez.*

The question on this appeal is simply the district court's authority to refuse to accept the Government's affidavits, there being no question that if the underlying facts were as therein represented, the Government would be entitled to prevail under *Chavez.*

In granting the suppression motion, the district court reflected awareness of the Supreme Court's decision in *United States* v. *Giordano,* 416 U.S. 505 (1973), and, we may assume, of the companion case, *Chavez* itself. The district court emphasized in open court that its ruling was based on a lack of satisfaction

> "that the Government has carried the burden of proving by clear evidence that there was a proper authorization by any of the officials specified in the statute. . . . . My decision is not an issue of or a question of law, it is a factual decision. I am not satisfied on the evidence as a matter of fact. I want that to be clear."

Therefore what is now relevant is not the ancient history of the mismanaged Will Wilson authorizations — all set forth at length in *Chavez* and *Giordano* — but simply

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whether the district court abused its discretion in rejecting the Government's affidavits so hastily. To put the court's action in perspective, we shall briefly sketch the history of this issue in the case.

The Will Wilson imbroglio, together with the disclosure that the Attorney General himself had purportedly authorized the very same wiretap in a hand-initialled memorandum, first emerged in affidavits of Acting Assistant Attorney General Henry Peterson and Sol Lindenbaum dated November 23, 1971. These included Lindenbaum's assertion,

> "On July 16, 1970, the Attorney General approved a request for authority to apply for an interception order in this case. Attached is a copy of his personally initialed memorandum of that date to Will Wilson, the Assistant Attorney General in charge of the Criminal Division, specially designating him to authorize Edward F. Harrington to apply for an interception order in this matter."

The memorandum, on government stationery, and bearing Mitchell's typewritten name and title, bore the handwritten initials "JNM".

On February 14, 1973, the sufficiency of these affidavits was challenged at a hearing before the district judge then handling the case (who was not the judge who later presided at the suppression proceedings). Defendants had moved to dismiss the indictments for, among other things, the false Will Wilson authorization. The judge stated that more specific evidence of proper authorization was called for, suggesting that an affidavit from Mitchell himself might be in order, and in any event that Lindenbaum's affidavit as worded was too sparse. He gave the Government time to produce something better. Thereafter the Government filed further, more elaborate affidavits from Lindenbaum and Peterson which covered, in addition, certain other related

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taps. Lindenbaum's affidavit now included a paragraph explaining that in the course of his duties, which he said included routinely reviewing wiretap authorization requests and making recommendations to the Attorney General thereon, he "became familiar with the . . . actions taken by Attorney General Mitchell on such requests. Also in the course of such duties, I became familiar with Mr. Mitchell's signature and signed initials." Mr. Lindenbaum stated that attached copies of memoranda were "personally initialled" by the Attorney General and that Attorney General Mitchell had "approved the requests" on the dates specified. There was also submitted a copy of an affidavit of Mitchell's prepared for another proceeding confirming generally the office policies described by Peterson and Lindenbaum, but not stating that Mitchell personally had authorized any of the taps in this case.

On October 16, 1972, the district judge entered an order denying the motions to dismiss the indictment on the grounds of illegal wiretap authorizations. In the order, he specifically found,

> "After hearing, and upon consideration of all submitted affidavits [citing Fed. R. Crim. P. 12(b)(4), which authorizes affidavits], arguments of counsel, and pertinent legal authorities, the Court finds and rules that former Attorney General John N. Mitchell personally approved the disputed wiretap authorizations in this case in conformity with 18 U.S.C. § 2516(1)."

Thereafter, the docket reflects that on April 5, 1973, the court stayed a hearing on motions to suppress on the issue of authorization pending the outcome of the *Giordano* case and also granted at least one of the defendants' motions for reconsideration of the court's action on the motions to dismiss. While this subsequent action lessens the impact of the court's earlier ruling on the motions to dismiss, it does

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not show that the prior judge was necessarily retreating from his factual finding that Mitchell had personally approved the authorizations. Rather the decision seems to have been made to await the Supreme Court's resolution of the controlling legal issues.

The next relevant hearing was the one from which this appeal was taken, on December 18, 1974. It was prefaced by motions of defendants questioning the accuracy of the Lindenbaum affidavits and pointing out, citing *Giordano*, that Lindenbaum had conceded on occasion placing Mitchell's initials on memoranda. Counsel said it was their intention to inquire deeply into whether Mitchell himself and not Lindenbaum had authorized the taps. At the December 18 hearing, the court asked the Government what it intended to do "other than what is in the file" to satisfy its burden of establishing authorization by "clear" evidence. When the attorney for the Government replied "nothing," the court allowed the motions to suppress, stating that Mr. Lindenbaum was not an "expert on handwriting, nor do I think mere office familiarity is enough . . . I am not going to accept his affidavit." The court mentioned that in other cases "we have had a specific affidavit from Mr. Mitchell with respect to particular authorization."

On January 20, 1975, the Government moved for reconsideration, this time presenting an affidavit from former Attorney General Mitchell stating unequivocally that the memoranda and initials were his own, and that he had authorized the particular wiretaps. This affidavit was in all substantial respects the same as the affidavit filed by Mitchell in *Chavez, see* 478 F.2d 512, 514 (9th Cir. 1973), just as was Lindenbaum's earlier affidavit, *id.* at 513-14 (except, of course, the documents described the particulars of different wiretaps). The court denied the motion, stating,

"I do not accept Mr. Mitchell's affidavit made so long

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after the event and in Mr. Mitchell's present circumstances. It is too little and too late. . . ."

We are of the opinion that the district court moved somewhat too peremptorily. We do not question its authority to insist upon adequate and clear proof by the Government, and we recognize that different judges, within reasonable limits, may want more or less evidence to satisfy themselves. Thus at the December 18 hearing, we think the court could have demanded an affidavit from Mitchell and announced its intention to suppress if one was not provided forthwith. Still it must be recognized that a previous judge had found the Lindenbaum-Peterson documents to be sufficient by themselves to show authorization by Mitchell, and in several cases, courts have accepted Lindenbaum's and Peterson's affidavits, standing alone and without Mitchell's further affidavit, as adequate. *See United States* v. *Quintana*, 508 F.2d 867 (7th Cir. 1975); *United States* v. *Brick*, 502 F.2d 219 (8th Cir. 1974). Under the circumstances, we do not think the Government acted unreasonably in relying on the affidavits then available. The government attorney, it is true, did not offer to procure anything else when questioned by the judge; still the tortuous history of the case and of the national calamity which affected it doubtless made it difficult for the government attorney to assure that verification from Mitchell himself would be forthcoming, as well as to predict what quantum of proof a given judge might require.

Nonetheless, had the Government offered nothing further after the December 18 ruling we might well have accepted the ruling as within the court's discretion. The court might have construed the lack of a Mitchell affidavit at a time when such affidavits had been furnished in other cases as indicative that Mitchell could not personally vouch for these particular transactions. When his affidavit was tendered, how-

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ever, this largely allayed doubts on that score, and we think the court should have reopened the proceeding.

Normally, of course, district courts have wide latitude to refuse reconsideration. But this was a unique situation where those immediately responsible for the Government's case cannot be said to have been derelict in their preparation. Another judge had earlier accepted the affidavits as probative of Mitchell's authority. His action was not binding, but it at least justified the Government in believing that it had met the threshold requirements for "clear" evidence. If more was desired, it was entitled to be told and to have a reasonable opportunity to produce it.

We do not go quite so far as Judge Bright, concurring in *United States* v. *Brick, supra,* at 227, who said,

> "I read *Chavez* as construing the existence of the Attorney General's initials on form memoranda to Will Wilson and the subsequent affidavits of Sol Lindenbaum or Mitchell himself stating that those initials signified approval for the authorization to be sufficient to establish the wiretap authority, without more."

But certainly after *Chavez,* affidavits by *both* Lindenbaum and Mitchell, identical to those in *Chavez,* would normally be sufficient on their face unless defendants had come forward with evidence casting doubt on their veracity. *See, e.g., United States* v. *Doolittle,* 507 F.2d 1368, 1371 (5th Cir. 1975); *United States* v. *Quintana,* 508 F.2d 867, 870-72 (7th Cir. 1975); *United States* v. *Ramsey,* 503 F.2d 1200, 1202-03 (7th Cir. 1975). If, as here, the district court found such affidavits insufficient in view of the circumstances of the case, the court might require more from the Government. For instance, the court might insist that the Government furnish particulars, such as whether Mitchell was at his office on the dates in question or how Mitchell could remember this particular authorization after so long, or might

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even require an evidentiary hearing on some issues. But here the affidavits were not only rejected out of hand, but the Government was given no opportunity to establish its position by producing further support that Mitchell authorized the wiretaps, because in advance of the court's ruling it had no reason to expect that more than what it presented was necessary. If courts could peremptorily reject normally adequate affidavits in this area, the Government would face an intolerable burden in having to surmise the degree of verification required for each case and each judge. Of course, the Government would not be entitled to a second chance if it were to delay or not produce initially what would ordinarily be known to be necessary. But this does not appear.

We accordingly vacate the order granting the motion to suppress and remand for further proceedings consistent herewith. The Government may provide further affidavits and other evidence as to Mitchell's authorization, and defendants may pursue their attacks on it to the extent the court finds reasonable. We would add that the court has extensive discretion in handling such preliminary motions to proceed by affidavit or to receive other evidence, and absent a clear abuse of discretion its determination of what limitations to impose on the type and amount of evidence will not be upset. *See* Fed. R. Crim. P. 12(b)(4). The court may then rule anew on the suppression motion in light of all the evidence.

Defendants contend that the appeal was untimely. *See* Fed. R. App. P. 4(b). The district court announced orally on December 18, 1974, "I will allow the motion to suppress . . ." and, later, "I will enter an order today allowing all of the motions to suppress . . ." The docket entry for December 18 reflects

"SKINNER, J. Case called for hearing on pending mo-

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> tions; arguments by counsel; motions for each defendant to suppress evidence, ALLOWED."

However, on December 19 the judge himself endorsed the following order on the suppression hearing transcript,

> "All of the motions in the above entitled cases to suppress the evidence of wiretaps are ALLOWED. The foregoing transcript of the hearing shall constitute my memorandum of findings and rulings and shall be filed in each case."

The docket for December 20 reflects that the transcript with the judge's order endorsed thereon was filed December 20, 1974.

We agree with the Government that the court's "order," *see* 18 U.S.C. § 2518(10)(b), or "decision, judgment or order," *see* 18 U.S.C. § 3731, tolling the appeal period was later than December 18. We need not decide whether the date was the nineteenth, when Judge Skinner actually made it, or the twentieth when the endorsed transcript, which was to serve as his Memorandum of Findings and Rulings, was filed. Where, as here, a judge enters a formal order within the appeal period, the date of the order is, for appeal purposes, presumptively controlling over a previous oral indication. *United States* v. *Lee*, 501 F.2d 890, 891, n. 1 (D.C. Cir. 1974); *see United States* v. *Hark*, 320 U.S. 531, 535 (1944). In the present case, the judge said that he intended to enter an order, and while he spoke of doing so on the eighteenth he did not get around to drafting it until the nineteenth. The more formal action controls.

Taking the nineteenth as the date, the 30-day appeal period, *see* 18 U.S.C. §§ 2518(10)(b), 3731, would run through Monday, January 20, the actual thirty day period having expired on the Saturday preceding. Fed. R. Crim. P. 44(a). On that date, the Government filed its motion for reconsideration, which was denied the same day. Appeal

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from denial of the motion for reconsideration was filed within 30 days, on February 19, 1975.

Appellees contend that this rather breathless procedure did not get the Government under the wire. We think it did. *United States* v. *Healy*, 376 U.S. 75 (1964). The time provisions are, of course, mandatory and would require dismissal if not met; but the court held in *Healy* that where the Government in a criminal case had filed a petition for rehearing within the appeal period following dismissal of an indictment, the 30 days ran from the date of the denial of the petition for rehearing. Appellees urge various reasons for distinguishing *Healy*, none of which seem to us significant. It was sound procedure for the Government to approach the district judge first with the Mitchell affidavit, since it was entirely possible that the affidavit would obviate any need for an appeal. *See id.* at 80. The Rules require the Government to certify that its appeal is not for purposes of delay, and to prosecute diligently, and abuse of these procedures for purposes of delay can be readily controlled by the court. The distinction between a question of fact and a question of law, if indeed such can be made here, is of no significance that we can perceive in this situation.

Vacated and remanded for proceedings in conformity herewith.

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